2004 BCSECCOM 622

COR#04/130

Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey

***Securities Act,* RSBC 1996, c. 418**

Ruling on Application for Direction

I. Background

¶ 1 On June 24, 2004, we made a ruling on an application by Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey for disclosure of materials in the possession of the Executive Director (see *Re Timothy Fernback et al*, 2004 BCSECCOM 378).

¶ 2 At the time of that application, the standard for the disclosure of evidence in enforcement hearings before the Commission was that articulated by the Commission in *Re Cartaway*, [1999] 22 BCSC Weekly Summary 27. The applicants argued that the appropriate standard ought to be that enunciated in *R. v. Stinchcombe*, [1991] 3 SCR 326.

¶ 3 We first considered whether there were reasons to reconsider the *Cartaway* standard. We concluded that there were reasons to do so, which included the following:

- the differences between the *Cartaway* and *Stinchcombe* standards were creating confusion among parties to Commission hearings over what is subject to disclosure
- since *Cartaway* was decided, the Ontario Securities Commission has moved to the *Stinchcombe* standard
- since *Cartaway* was decided, the Commission's penalty powers have increased.

¶ 4 Having concluded that it made sense to revisit the *Cartaway* standard, we stated the issue to be decided as follows:

> Is there a sound public interest purpose in adopting a disclosure standard that falls short of the standard in *Stinchcombe* for enforcement hearings under the Act, having regard to the procedural fairness context referred to in [*Knight v. Indian Head School Division No. 19 of Saskatchewan*, [1990] 1 SCR 653].

¶ 5 We concluded that there was not and went on to decide that the appropriate standard of relevance for the disclosure of evidence in enforcement hearings under the Act is the *Stinchcombe* standard. In making this decision we cited the following factors:

- the reasons articulated by the OSC in its factum to the Supreme Court of Canada in *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 SCR 713
- in considering the elements of procedural fairness for proceedings under the Act, we must be mindful of the need to maintain a system of enforcement that can deal efficiently with market misconduct
- it would be appropriate to adopt a broad view of relevance
- given the national nature of markets and a trend to greater cooperation among regulators, it makes sense that the disclosure obligations of one regulator arising out of the same set of facts match those of other regulators.

¶ 6 We then dealt with the specific disclosure requests in the application as follows:

> 41 As a result of the order below, we expect the Executive Director to disclose to the applicants all relevant information that is not privileged. It is therefore not necessary to deal with the specific disclosure requests in paragraph 1 of the application.
> . . .
> 43 We therefore order the Executive Director to disclose to the applicants all materials required to be disclosed under the *Stinchcombe* standard.

¶ 7 On September 21, 2004 the Executive Director applied for our direction on the application of the *Stinchcombe* standard to proceedings before the Commission. In support of the application, the Executive Director filed an affidavit of a Commission staff member. The affidavit attached as exhibits true copies of two letters: one from counsel for the Executive Director to staff of the OSC containing questions about the disclosure practices of OSC staff, and one from OSC staff answering those questions.

¶ 8 The respondents responded in writing to the Executive Director's application and the Executive Director replied to those responses.

II. The Application

¶ 9 The Executive Director says our June ruling contains two elements that cannot be reconciled and therefore further direction is required. The Executive Director

acknowledges that the ruling "simply and unambiguously mandated *Stinchcombe*-level disclosure", but says "the Commission also made clear that it considered consistency with Ontario practice to be desirable".

¶ 10 The Executive Director's confusion seems to arise from the fact that the *Stinchcombe* standard was developed in the criminal law context, and it appears (according to the Executive Director) that the OSC applies *Stinchcombe* in a way that differs from its application in criminal cases. Therefore, says the Executive Director, "the [June] ruling contains policy directives within it that the staff is unable to reconcile".

¶ 11 The Executive Director's application then goes on to seek direction on the following specific questions:

Commission Staff Materials

1. With respect to currently undisclosed documents and records in the possession of Commission staff:

   (a) Should investigation briefs or reports that were prepared by Commission investigators and submitted to legal counsel in contemplation of the issuance of the Notice of Hearing be disclosed?

   (b) Should Commission staff correspondence with RS, the CDNX and the TSX-V (collectively, the SROs) relating to the investigation be disclosed?

   (c) Should internal Commission staff memoranda concerning the file be disclosed?

   (d) Should notes of meetings among Commission staff concerning the file be disclosed?

   (e) Should notes made by Commission investigators while reviewing evidence be disclosed?

   (f) Should working papers containing the analyses of Commission investigators be disclosed?

   (g) Should questions and notes prepared by Commission investigators in anticipation of witness interviews be disclosed?

SRO Materials

2. The SROs possess documents and records that were created in connection with this case and that currently remain undisclosed. With respect to these materials:

   (a) Should reports prepared by SRO investigation staff and provided to SRO legal counsel in contemplation of SRO proceedings be disclosed?

   (b) Should SRO correspondence with Commission staff be disclosed?

   (c) Should internal SRO memoranda concerning the file be disclosed?

   (d) Should notes of meetings among SRO staff concerning the file be disclosed?

   (e) Should notes made by SRO investigators while reviewing evidence be disclosed?

   (f) Should working papers containing the analyses of SRO investigators be disclosed?

   (g) Should questions and note prepared by SRO investigators in anticipation of witness interviews be disclosed?

Third Party Materials

3. An investigation into a securities-related matter may result in the collection of documents and records that contain third party information. This would include, for example, trading or bank account information. Such materials are often gathered in anticipation that they will be relevant, but turn not to be.

   In connection with the investigation of this matter, Commission and SRO investigative staff acquired documents and records containing third party information that does not appear to have any direct relevance to the allegations in the Notice of Hearing. These materials currently remain undisclosed.
   With respect to these materials:

(a) Should documents containing third party information that is not plainly and directly relevant to the allegations in the Notice of Hearing be disclosed?

(b) If, in their best judgment, Commission or SRO staff conclude that fairness to the Respondents requires the disclosure of a third party's information, what kind of notice, if any, should be provided to that person to deal with privacy concerns?

(c) Information pertaining to the securities trading at issue in this case is contained in audiotapes of telephone calls made by the CDNX surveillance staff on February 11, 2000. Those tapes contain information concerning other securities by unrelated third parties. Should copies of the entire audiotapes be disclosed?

III. The Respondents' Position

¶ 12 Wolverton and Wolverton Securities say that the Executive Director's application amounts to an application to re-argue the June ruling. They go on to say that the correspondence with the OSC amounts to new evidence and is not properly admissible at this stage. However, if it is to be admitted, they request the opportunity to cross-examine on that evidence and introduce evidence of their own on the subject of practice before the OSC.

¶ 13 Fernback and Massey concur in the submissions of Wolverton and Wolverton Securities. In addition, Fernback objects to the three-month delay between the date of the June ruling and the Executive Director's application. He also says that the application should be dealt with in an oral hearing.

IV. Discussion and Analysis

¶ 14 We do not agree that the Executive Director's application amounts to a re-argument of the original application. In our opinion, we have, in the materials filed by the parties, all that we need to dispose of this application.

¶ 15 We think the Executive Director has over-emphasized the importance of OSC practice in determining how to apply *Stinchcombe* to enforcement proceedings under the Act. In the June ruling we cited four factors that we considered in making our decision. The desirability of common disclosure standards among securities regulators was only one of them, and in identifying that as a factor we did not intend to suggest that the disclosure practices for hearings before the OSC was determinative.

¶ 16 The relevance of OSC practice is limited to the fact that the OSC purports to apply the *Stinchcombe* standard. For this reason, in making this ruling we have not

considered the correspondence between counsel for the Executive Director and OSC staff.

¶ 17 The *Stinchcombe* standard, as set forth in paragraphs 37 through 40 of our June ruling, establishes a standard of *relevance* for the disclosure of *evidence*.

¶ 18 With that in mind, here are some guidelines that we think ought to be followed in applying the *Stinchcombe* standard of relevance in enforcement hearings before the Commission:

1. The *Stinchcombe* standard deals with the disclosure of evidence. *Stinchcombe* itself, and the cases that follow it, deal with evidentiary matters such as witness statements, blood samples, and so on. The mere opinion of an investigator as to any matter under investigation, as to any piece of evidence, or as to the testimony of any witness, is not disclosable, simply because it is not evidence.

2. It is not possible to rule definitively that any category of documents is or is not disclosable. It depends on their content. If the document includes evidence that meets the *Stinchcombe* standard of relevance, then that evidence must be disclosed.

3. The disclosure standard applies to all information in the possession of the Executive Director, whether or not it includes information about a third party.

V. Ruling

¶ 19 We therefore answer the questions in the application as follows:

Questions related to Commission staff materials

¶ 20 Applying guidelines 1 and 2 above, the answer to all these questions is as follows. If a document contains relevant evidence, then the part of the document that contains the relevant evidence must be disclosed.

Questions related to SRO materials

¶ 21 This category is described in the application as follows: "The SROs possess documents and records that were created in connection with this case and that currently remain undisclosed." The SROs (self-regulatory organizations) referred to here are the Canadian Venture Exchange, now the TSX Venture Exchange, and Market Regulation Services, Inc.

¶ 22 The investigators appointed in this matter under the investigation order included employees of the SROs. However, all information gathered by any investigator

appointed under a Commission investigation order, and any work product derived therefrom, belongs to the Commission..

¶ 23 That said, the answer to these questions is the same answer we gave to the questions relating to Commission staff materials.

Questions related to Third Party Materials

¶ 24 We answer each of these questions as follows:

(a) Should documents containing third party information that is not plainly and directly relevant to the allegations in the Notice of Hearing be disclosed?
As noted in guideline 3 above, the disclosure standard applies to all information in the possession of the Executive Director, including information obtained from, or relating to, a third party. Clearly, information that does not meet the standard of relevance does not have to be disclosed. However, the standard is the same for all information. To the extent the question is asking whether a different standard of relevance ("plainly and directly relevant to the allegations in the Notice of Hearing") applies to information about a third party, the answer is "No".

(b) If, in their best judgment, Commission or SRO staff conclude that fairness to the Respondents requires the disclosure of a third party's information, what kind of notice, if any, should be provided to that person to deal with privacy concerns?
Privacy concerns are not a recognized exception to disclosure under the *Stinchcombe* standard, except insofar as privilege applies. However, when disclosable information includes material that raises those concerns, Commission staff should first consider whether the confidential aspects of the information meet the relevance standard. If not, the confidential information can be redacted.

If disclosure of the confidential information is necessary to meet the relevance standard, then it must be disclosed, and it is not necessary to give notice to the third party.

(c) Information pertaining to the securities trading at issue in this case is contained in audiotapes of telephone calls made by the CDNX surveillance staff on February 11, 2000. Those tapes contain information concerning other securities by unrelated third parties. Should copies of the entire audiotapes be disclosed?"

¶ 25 The respondents are interested in these tapes because the Wolverton Securities trading manager, Nicole Stevens, says she had a conversation or conversations with CDNX Control that are not reflected in the transcript that has been disclosed. The only conversations on these tapes that are relevant to that issue are those in which Stevens participated. The tapes must be disclosed but they may first be

edited to erase all conversations not involving Stevens. All conversations with Stevens must be left intact. Stevens alleges that she had additional conversations with CDNX Control that day that have not been disclosed and that involved trades in shares of Cinema Internet Networks Inc. Disclosure of all her conversations that day will resolve this issue.

Further disclosure

¶ 26 We share the concern expressed by Fernback over the passage of time between the June ruling and this application. We also note that the Executive Director has made no further disclosure since that ruling. This may be because there was nothing further to disclose, other than materials potentially subject to disclosure depending on the outcome of this application.

¶ 27 In any event, we expect the Executive Director forthwith (a) to make any additional disclosure required as a result of our disposition of this application, or (b) if no additional disclosure is required, to so advise the respondents.

¶ 28 The hearing in this matter begins on November 30. If any disclosure issues remain outstanding on November 5, we direct the parties to appear before us as soon as possible so that those issues can be resolved.

¶ 29 October 29, 2004

Brent W. Aitken
Vice Chair

Joan L. Brockman
Commissioner

John K. Graf
Commissioner